WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SERGIO AVILA, *Applicant*

vs.

ADVANCED CONSTRUCTION; BITCO/OLD REPUBLIC GENERAL INSURANCE CORP., administered by GALLAGHER BASSETT SERVICES, INC.; *Defendants*

Adjudication Numbers: ADJ11880536
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the May 8, 2025 Findings and Order ("F&O"), wherein the workers' compensation administrative law judge ("WCJ") concluded that defendant Advanced Construction ("ACS") was entitled to a credit from a third-party settlement related to applicant's claim, in an amount and manner "to be adjusted by the parties." Applicant contends that the WCJ erred in calculating both ACS's share of the comparative negligence and the total value of applicant's case.

We received an Answer from ACS. The WCJ prepared a Report and Recommendation on Petition for Reconsideration ("Report"), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the F&O and return the matter to the WCJ for further proceedings.

FACTS AND PROCEDURAL HISTORY

Applicant filed an Application for Adjudication, alleging a specific injury to multiple body parts sustained on December 3, 2018, while employed by defendant as a carpenter. Applicant was injured falling through a hole at the worksite to the floor approximately twelve feet below, sustaining serious injuries. The parties do not contest that the hole in question was marked off

with guardrails, or that applicant crossed those guardrails in order to make it easier to perform a task. Although not entirely clear from the record, it appears that a piece of plywood had been placed over the hole, and that applicant placed his weight on the plywood, which could not support his weight and led to the fall. ACS has provided medical treatment, along with disability benefits.

Applicant and his wife also brought a third-party lawsuit against Holland Partners Group Management Inc. ("Holland"), the general contractor, Conco, the concrete subcontractor, and Smart Safety Solutions ("SSS"), a safety company hired to provide training and safety services.[1]

That suit was settled on August 22, 2022, with a disbursement sheet showing the amount of the gross settlement as $1,020,000.00, with a net recovery of $585,229.05. As far as can be told from the record, ACS did not intervene or otherwise participate in the civil lawsuit.

On February 7, 2023, ACS filed a Petition for Third-Party Credit, alleging the right to a credit against applicant's civil recovery, pursuant to Labor Code sections 3858 and 3861. Applicant timely objected.

On July 11, 2023, the matter came on for hearing on the following issues: (1) attorney's fees; and (2) ACS' Petition for Credit. (Minutes of Hearing / Summary of Evidence ("MOH/SOE"), 7/11/2023, at p. 2.) Exhibits were introduced and numbered, and most were admitted, with rulings on admissibility as to some numbered exhibits deferred. (*Id.* At pp. 2–5.) In addition, the WCJ deferred ruling on additional exhibits applicant sought to introduce related to applicant's economic and medical damages, instead instructing applicant to file a petition. (*Id.* at p. 5.) Applicant subsequently filed such a petition, seeking to introduce three exhibits: (1) a life care plan showing applicant's estimated future medical costs; (2) an economic impact report showing applicant's estimated loss of income; and (3) a declaration from applicant's civil attorney, attesting to the division of the settlement among the various defendants. Applicant provided testimony, and the matter was taken under submission. (*Id.* at pp. 5–10.)

On September 13, 2023, the WCJ issued a Findings & Award ("First Findings"), finding that ACS was entitled to a third-party credit "to be adjusted by the parties, up to the amount of the net recovery for applicant in the third party claim." (First Findings, at p. 1.) The appended Opinion on Decision makes clear that the WCJ found that applicant failed to prove that ACS was negligent with regard to the causation of applicant's injury, instead stating:

[1] According to evidence submitted by applicant but not admitted by the WCJ, an amended complaint was later filed, adding Safety Compliance Management, Inc. as a defendant.

> Given that there were multiple parties involved in the construction of the building where applicant was injured, and no evidence regarding the relative roles of each party in what happened to the applicant, and little evidence beyond the OSHA violations that ACS was involved at all, it would be impossible to make a finding on whether ACS, specifically, was negligent in this situation. Since applicant has not met their burden of proof on this issue, the defendants are entitled to a full credit and reimbursement of the benefits already paid out.

(Opinion on Decision to First Findings, at p. 5.) The Opinion on Decision also stated that applicant's petition to introduce further exhibits was denied "as the documents are not necessary to the proceedings." (*Id.* at p. 6.)

Applicant timely filed a Petition for Reconsideration, and the WCJ timely vacated the First Findings and set the matter for further proceedings. (Order Rescinding Decision, Vacating Submission and Notice of Hearing (Rule 10859), October 19, 2023.)

The matter came on for hearing again on March 3, 2025, after the parties had further developed the record by obtaining expert reports addressing comparative negligence and other issues relevant to the section 3861 credit determination. (MOH/SOE, 3/3/2025, at p. 2.) These new reports were admitted, and the matter was taken back under submission without further testimony. (*Id.* at p. 3.)

On May 8, 2025, the WCJ issued her F&O, finding in relevant part that:

> 2. There was a 3rd party settlement in the amount of $1,202,000.00.
> 3. Defendant ACS is 5% responsible for failure to properly inspect the premises.
> 4. Applicant is 10% responsible for the injury/incident.

(F&O, at ¶¶ 2–4.) The F&O went on to order "that defendants are entitled to a credit from the 3rd party settlement less their proportional share of liability, as detailed in the opinion below." (*Id.* at p. 1.) The appended Opinion on Decision contains an extensive summary of the legal standards governing Labor Code section 3861 claims, of the evidence in the case, and of the WCJ's interpretation of that evidence. As relevant to this Petition, the WCJ first concluded that defendant had proved applicant received a net recovery of $585,229.05 from his third party suit. (Opinion on Decision, at p. 5.) Next, the WCJ opined that ACS' expert was more convincing on the question of comparative negligence than applicant's, "based on the experience of the experts, and the analysis provided." (*Id.* at p. 14.)

Recognizing that "an employer's statutory duty to maintain a safe workplace cannot be delegated to a third party," the WCJ found that applicant had initially demonstrated negligence on

ACS' part, based on ACS' failure to ensure that the plywood covering was properly placed, and a lack of evidence that ACS had conducted a safety training with applicant prior to him starting his shift. (*Id.* at p. 15.)

Proceeding to the next step of the analysis, the WCJ determined that, although ACS was negligent, its negligence was comparatively small, and represented only 5% of the causation of the injury. (*Id.* at pp. 15.) The WCJ noted that SSS had been hired specifically to ensure the safety of the work site, and that ACS' supervisor had specifically told applicant not to cross the guardrails. (*Id.* at p. 14.)

The WCJ went on to observe:

> While not conclusive, it is telling that Conco and Holland were civilly sued, not ACS, nor were they joined by the other defendants. Holland is the general contractor, and ACS had been on the site for less than a month prior to the injury, from what I can discern from the evidence, and ultimately they are responsible for the job site. The testimony entered as evidence all seems to show that Conco, the concrete contractor, was responsible for creating the shaft, and the guardrails (which may or may not have been compliant - the applicant's testimony seems to imply there was only one "rail" on the guardrail, although other testimony and photos show it to have more than that), and if there was plyboard on top of, or embedded into the concrete, it would also be Conco's responsibility, the "creating" party if you will.
>
> Next up [i]s the applicant[.] The applicant was certainly complicit in that he was somewhat experienced as a carpenter, admitted to having training at other jobs, was specifically told where to perform the tasks, and not only did he perform the task from the opposite side of the wall, he then breached the guardrail in order to complete the task.
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> I find that the applicant was 10% responsible for the injury. I find Conco to hold 40% of the liability, and SMART Safety another 40%, and Holland and ACS to each be 5% responsible.

(*Id.* at p. 15.)

Turning to the last step of the analysis, the WCJ wrote:

> Lastly, the burden shifts once again to the applicant to establish total civil damages. It appears that applicant is relying on the reports of Mr. [Viadro], however, his analysis was not developed. Reportedly based on what the civil attorney indicated was a likely outcome of at least $10,000,000 after a jury trial. I note, however, that the matter was settled for a little over $1 million dollars. Since the [Viadro] report cannot be relied on, I find the damages to be the actual recovery of the applicant, or $585,229.05 (according to Exhibit A). The gross

> settlement is for $1,020,000. 5% of $1,020,000 is $51,000. No evidence on what has been paid in benefits by the defendants was entered into evidence, so the parties are ordered to meet and confer and adjust the credit amounts informally based on percentages above.

(*Ibid.*)

The Opinion on Decision also once again rejected the additional exhibits applicant had attempted to introduce previously, repeating the finding that "the documents are not necessary to proceedings." (*Id.* at p. 16.)

This Petition for Reconsideration followed.

DISCUSSION

I.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> > (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
> >
> > (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on June 4, 2025, and 60 days from the date of transmission is Sunday, August 3, 2025. The next business day that

is 60 days from the date of transmission is Monday, August 4, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, August 4, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on June 4, 2025, and the case was transmitted to the Appeals Board on June 4, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on June 4, 2024.

II.

Initially, we note that ACS' Answer asserts that the Petition was served upon defense counsel at the wrong address, and that ACS has also filed a Petition for Sanctions and Costs with the WCJ, involving both this and other issues. Given that the Answer addresses the merits of the Petition, and that ACS has chosen to pursue this and other issues at the trial level via its petition for sanctions, we elect to defer consideration of these issues to the WCJ after remand.

Proceeding to the merits, Labor Code Section 3861 authorizes the Appeals Board to "allow, as a credit to the employer to be applied against his liability for compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment, as has not theretofore been applied to the payment of expenses or attorneys' fees, pursuant to the provisions

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

of Sections 3856, 3858, and 3860 of this code, or has not been applied to reimburse the employer." (Lab. Code, § 3861.)

In *Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (Cole)* (1978) 22 Cal.3d 829, the California Supreme Court observed "that the concurrent negligence of the employer bars his right to a credit against his liability for compensation for the amount of any recovery for his injury obtained by the employee by settlement of his cause of action against third parties; and [] that where the employer's negligence has not been adjudicated in such third party action, the applicant is entitled to have it adjudicated before the Board." (*Id.* at p. 835.) Accordingly, "[w]hen the issue of an employer's concurrent negligence arises in the context of his credit claim based on a third party settlement, the board must determine the appropriate contribution of the employer since the employee's recovery does not represent a judicial determination of tort damages. Specifically, the board must determine (1) the degree of fault of the employer, and (2) the total damages to which the employee is entitled. The board must then deny the employer credit until the ratio of his contribution to the employee's damages corresponds to his proportional share of fault." (*Id.* at p. 843.)

One year later, we issued our en banc decision in *Martinez v. Associated Engineering and Construction Co.* (1979) 44 Cal.Comp.Cases 1012, wherein we described the shifting burdens of proof necessary to effectuate the analysis described in *Cole,* supra:

> First, defendant has the burden of proof to establish its right to claim a credit. It must show that there was a third party settlement and that it has paid out compensation benefits or will likely have to pay such benefits in the future. This can be done by production of certified copies of the Superior Court documents reflecting a settlement or judgment. Normally however, as in this case, copies of the documents or a stipulation as to applicant's net recovery will suffice.
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> …
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> Second, once a prima facie case has been made to show entitlement to credit, applicant has the burden of proof to establish the employer was negligent in any degree. If there is no employer negligence, the carrier is entitled to full credit.
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> …
>
> Third, the burden of going forward shifts to the employer or carrier to show comparative negligence of the third party defendant or defendants and any negligence by applicant.

…

> Fourth, the burden then shifts to applicant to establish his total damages, i.e., that figure to which the employer's negligence is applied after deducting applicant's proportionate share of comparative negligence, to determine credit in accordance with the formula in *Associated (Cole),* supra. In this case, it was unnecessary for applicant to prove, or the workers' compensation judge to determine, applicant's actual damages in view of the finding on employer negligence. Thus, where the evidence establishes 100% employer negligence, or overwhelming employer negligence, or even a high degree of employer negligence, it would be necessary to take only enough evidence to establish that compensation benefits could not possibly exceed the employer's share of the damages.

(*Id.* at p. 1021.)

More generally, the WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton, supra,* at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952, subd. (d*); Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] … For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id.* at p. 476 (citing *Evans, supra,* 68 Cal. 2d at p. 755.)

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal. App. 4th 1117, 1121–1122 [63 Cal. Comp. Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.*

(2000) 79 Cal. App. 4th 396, 403 [65 Cal. Comp. Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

As a preliminary matter, we note that while the WCJ's Opinion on Decision in this case is admirably thorough with regard to the evidence cited, the F&O itself lacks findings of fact on several key issues necessary to the determination of the Labor Code section 3861 credit. Specifically, the F&O orders that "defendants are entitled to a credit from the 3rd party settlement less their proportional share of liability, as detailed in the opinion below." (F&O, at p. 1.) Although the meaning of this order can be more-or-less pieced together by review of the Opinion on Decision, the Opinion on Decision is an explanation for how the WCJ arrived at their conclusion, not that conclusion itself. Here, the F&O itself contains no findings as to the size of the recovery against which the credit is to be allowed, the amount of such credit, or whether the credit is immediately allowable, or only allowable after a certain amount of further benefits have been paid. To the extent that the F&O itself does not provide for an award of a sufficiently definite nature to be calculable without regard to the Opinion on Decision, it does not constitute an enforceable award and would need to be amended even if we agreed with the WCJ in all other respects.

Turning to the specific legal standard governing the credit claim, we note that there are gaps in the evidence, of varying degrees of seriousness, with regard to the first, third and fourth prongs of the *Martinez* test. At a more basic level, the WCJ's decision to discount the conclusions of applicant's comparative negligence expert and endorse those of ACS' does not appear to align with the WCJ's actual findings as to comparative negligence, which if anything seem to endorse the reasoning of applicant's expert more than ACS', albeit while finding a much lower level of negligence than advocated for by applicant's expert.

Regarding the first prong, we note that evidence was submitted showing a net recovery of $585,229.05. (D. Ex. A, at p. 2.) However, other evidence submitted in the case indicates that the lawsuit in question was filed both by applicant and his wife, Lidubina Mata. (See D. Ex. B.) From the evidence submitted, it is unclear whether the $585,229.05 net recovery was entirely attributable to applicant, or whether some portion of it was attributable to claims brought by his wife, for damages of the sort that would not properly be subject to credit under Labor Code section 3861 because they belong to applicant's wife, not to applicant – for example, loss of consortium. If the net recovery did include damages recovered by applicant's wife, those should be deducted from the net recovery, assuming they were reasonably allocated. (See *Reid v. Workers Compensation*

Appeals Bd. (1995) 60 Cal. Comp. Cases 360.) On remand, we suggest the parties clarify this issue.

With regard to the third prong, we must first address the WCJ's decision to endorse ACS' expert over applicant's expert. In the Opinion on Decision, the WCJ wrote: "As a preliminary item, I find defendants expert to be the more reliable and to carry more weight, based on the experience of the experts, and the analysis provided." (Opinion on Decision, at p. 14.) Although the respective CVs do disclose that ACS' expert had substantially more experience than applicant's, ACS' expert also provided analysis suggesting that ACS was not negligent at all with regard to applicant's injury. This analysis necessarily conflicts with the WCJ's decision to find negligence in prong two of the analysis, based on the legally correct premise that an employer has a non-delegable duty to provide a safe workplace, no matter what other third parties may have been involved as well. (See Opinion on Decision, at pp. 13–14.)

The Opinion on Decision does not adequately explain why the WCJ found ACS' expert's analysis more convincing. Specifically, ACS' expert focused on *applicant's* negligence in crossing the guardrail, arguing that applicant should have known better than to cross the guardrail and put his weight on the plywood cover which ultimately did not support his weight. (D. Ex. D, at pp. 1–4.) ACS' expert also argued that the obligation was only to provide a guardrail or a cover, not both, and that an adequate guardrail was provided. (*Ibid.*) Finally, ACS' expert argued that applicant should have known that the plywood cover that was placed over the opening was insufficient to hold his weight. (*Id.* at p. 3.) Specifically, ACS' expert noted that the plywood cover did not bear the required markings for such a cover, or otherwise bear indications of sturdiness. (*Ibid.*)

Although all these findings certainly bear on applicant's responsibility, they do not effectively address the core question of a comparative negligence analysis. The very nature of comparative negligence is that negligence by one party does not negate the possibility of negligence by another. In other words, applicant's negligence does not preclude defendant's, it simply reduces the degree to which defendant can be found negligent itself. Along these same lines, ACS' expert does not address negligence by any of the third parties from whom applicant recovered. As far as can be told from ACS' expert's report, he believed that applicant was 100% negligent for the injury, with neither ACS or any other entity bearing any responsibility at all. We

do not believe that such an opinion can reasonably be credited. Indeed, here, the WCJ chose to attribute only 10% of the negligence to applicant, and 85% to the third parties.[3]

Nor is it clear why ACS' expert believed that the improper placement, construction and labelling of the hole cover *absolves* ACS and the third parties of responsibility for the injury, rather than accentuating it. Although it is true that the governing OSHA regulations require a guardrail or a cover, it does not follow that an inadequate cover is permissible as long as there is an adequate guardrail. Indeed, the WCJ specifically, and reasonably in our view, found as such:

> That being said, an unknown individual allegedly placed a piece of plywood on top of the shaft covering. If there was, in fact, a covering, ACS did have a duty to ensure that it was done properly. There is also no evidence that they conducted the safety training with the applicant that they themselves require, as well as the training by Holland, the general contractor. This puts some culpability on the defendants I find that the defendants, ACS, were partially responsible for the applicant's injuries.

(Opinion on Decision, at p. 15.) Again, the possibility that applicant should have known that the cover was inadequate does not absolve ACS of responsibility in a comparative negligence regime, it simply suggests that applicant may have been negligent as well.

Applicant's expert report, by contrast, emphasizes this very point: that defendant had a non-delegable duty to ensure a safe workplace. (A. Ex. 49, at pp. 4–5.) The Report notes ACS' failure to ensure an effective safety cover, to warn applicant that the safety cover was not sufficient to bear applicant's weight, or to conduct more general safety training. (*Ibid.*) These conclusions, if anything, appear more aligned with those of the WCJ than those of ACS' expert.

To be sure, a WCJ need not fully endorse the analysis of either expert, nor must a WCJ necessarily find comparative negligence in line with one report or the other; splitting the baby is, when supported by substantial evidence, a reasonable course of action. Nor are we suggesting that applicant's expert's report was itself necessarily without its flaws. However, when, as here, ACS' expert report appears to suffer from several rather fundamental flaws – particularly the failure to assess negligence against third parties – we cannot endorse the WCJ's apparent reliance on it.

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[3] When assessing comparative negligence, the WCJ stated: "While not conclusive, it is telling that Conco and Holland were civilly sued, not ACS, nor were they joined by the other defendants." (Opinion on Decision, at p. 15.) However, the exclusive remedy doctrine means that applicant could not have sued ACS civilly, nor could the other defendants have joined ACS. ACS itself could have intervened in the lawsuit – i.e, in the position of a plaintiff, not a defendant – but apparently did not do so in this case. Although we do not understand the WCJ to have relied upon this rationale as a significant part of the decision, we do note that ACS' presence or non-presence in the civil lawsuit is not relevant to the question to be decided here.

Additionally, with specific regard to the allocation of negligence to the third parties, we note that the additional evidence applicant attempted to submit includes a declaration from applicant's civil attorney stating that there was another party added to the civil case after applicant's deposition, Safety Compliance Management, Inc. ("SCM"), which was included in the settlement. Applicant's civil attorney went on to supply a breakdown of the settlement by defendant which indicated that SCM contributed a substantial amount.

This evidence was found inadmissible by the WCJ on the basis that was "not necessary to the proceedings." However, the presence of another third party who contributed to the settlement is certainly relevant to the analysis required to determine ACS' share of comparative negligence. We therefore cannot agree with the WCJ's stated rationale for refusing to admit this evidence.

This additional evidence applicant sought to admit also bears on the fourth prong of the analysis, the determination of applicant's total damages. Here, the WCJ chose to use the total value of the settlement - $1,020,000 – as a proxy for applicant's total damages. However, in contrast to settlements in the workers' compensation system, civil settlements need not adequately compensate the injured party for the full extent of their injuries; as such, the total value of the settlement is not an adequate proxy for the total damages sustained by the plaintiff. The additional evidence applicant attempted to submit showed well over $3 million in medical expenses and lost wages, even before getting into less easily quantifiable damages. Based on these figures, applicant's expert asserted a $10 million total value for applicant's damages. (A. Ex. 49, at p. 6.) Defendant's expert, by contrast, did not address this prong of the analysis at all. Although the WCJ need not simply accept applicant's $10 million evaluation, we do think it was incumbent on the WCJ to consider the evidence of applicant's total damages, rather than simply relying on the settlement value.

Finally, the WCJ noted that no evidence was submitted as to the actual extent of benefits already paid by ACS. In the absence of such evidence, award of a credit was premature, as a credit is only awardable once the defendant has paid more in benefits than its comparative share of the negligence. Although it appears that substantial payments have been made in this case thus far, proof of those payments must actually be submitted before defendant can be found entitled to a credit. (See *Cole, supra,* 22 Cal.3d 829 at 834.)

For all the above reasons, we conclude that the F&O cannot be affirmed. Accordingly, we will rescind the F&O and return the matter to the WCJ for further proceedings, including any further development of the record necessary.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 8, 2025 Findings and Order is **RESCINDED**, and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
August 1, 2025

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

SERGIO AVILA
PACIFIC WORKERS
KARLIN, HIURA & LASOTA

AW/*kl*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
KL